PONNUTHURAI v. NASIB SINGH

[F.C. (Thomson L.P., Barakbah C.J. (Malaya) and Tan Ah Tah F.J.) June 1, 1964]

[K.L. — Federal Court Civil Appeal No. 11 of 1964]

Bill of Sale — Execution of bill of sale as security for money lent — Bill of Sale void for non-renewal — Whether money recoverable as money had and received.

Moneylending — Lending of money on interest — Whether unpaid balance and interest recoverable as money had and received.

In November 1951 the respondent lent the appellant $4000 at 18% interest per annum. On November 30, 1951 the appellant executed in favour of the respondent a bill of sale by way of security in respect of 2 motor cars. The appellant made some payments in respect of principal and interest amounting in all to $1700, the last of which was paid on May 17, 1957. The respondent commenced proceedings in 1962 for $7113 being the balance of the principal amount of the loan together with interest at 12% and not at 18% per annum. In the court below it was contended for the appellant that (i) the amount of the loan was $3000 and not $4000 as alleged, (ii) the whole of this amount including interest had been paid (iii) the bill of sale was for a number of reasons void and (iv) the claim was barred by limitation. Gill J. (*supra*, p. 59) held that (a) the amount originally lent was $4000, of which only $1700 had been paid (b) prior to the commencement of the action the bill of sale had become void for want of renewal and (c) the respondent was entitled on the facts to recover the unpaid balance as money had and received at 12% interest, which came in all to $7113. The main ground of appeal was that the trial judge was wrong in holding that the respondent was entitled to recover the money lent and interest as money had and received.

Held: what was involved in the present case was a loan of money and lending of money is something which is not forbidden by law. Even if the bill of sale had been void *ab initio* there was nothing unlawful about the lending of money in connection with which it was given. The appeal should therefore be dismissed.

Cases referred to:—

(1) *Davies* v. *Rees* (1886) 17 Q.B.D. 408.

(2) *Burton* v. *Companies Registration Agency* 23 T.L.R. 337, 338.

(3) *Bradford Advance Co. Ltd.* v. *Ayers & Wife* [1924] W.N. 152.

(4) *North Central Wagon Finance Co. Ltd.* v. *Brailsford & Anor.* [1962] 1 All E.R. 502, 507.

(5) *Arnashellum Chetty* v. *Tengachee Nachhiar & Ors.* (1906) 10 S.S.L.R. 85.

(6) *Muthukaruppan* v. *Nagappa Chetty* (1912) 1 F.M.S.L.R. 97.

(7) *Boissevain* v. *Weil* [1950] 1 All E.R. 728.

FEDERAL COURT.

V. K. Palasuntharam for the appellant.

Lall Singh Muket, for the respondent.

Thomson L.P.: This appeal raises a question as to the rights of a person who has lent money on the security of a bill of sale which is found to be void.

The present respondent was the plaintiff in the original proceedings.

It was his case that in November, 1951, he lent the defendant $4,000 at 18% interest per annum and that on 30th November, 1951, the defendant executed in his favour a bill of sale by way of security in respect of two motor cars which was duly registered and was renewed from time to time. The defendant made some payments in respect of principal and interest amounting in all to $1,700, the last of which was made on 17th May, 1957, but since then nothing has been paid.

The present proceedings were commenced on 19th September, 1962. In these the plaintiff asked for an order of seizure and sale of the chattels comprised in the bill of sale but this claim was abandoned at the trial. He also claimed $7,113 being the balance of the principal amount of the loan together with interest at the rate of 12% and not at the stipulated rate as set out in the covenant in the bill of sale.

The defence was fourfold. The amount of the original loan was $3,000 and not $4,000 as alleged; the whole of this amount and the interest on it had been paid in full before the commencement of the action; the bill of sale was for a number of reasons void; and the claim was barred by limitation.

In the event the case came on for trial before Gill J. He found that the actual amount originally lent was $4,000, that the only payments which had been made in respect of the loan were as averred by the plaintiff and that the last of these was made on 17th May, 1957, that is less than six years before commencement of proceedings. He held, on grounds with which it is unnecessary to deal here, that prior to the commencement of the action the bill of sale had become void for want of renewal. He went on, however, to hold that the plaintiff was entitled on the facts of the case to recover the unpaid balance of the amount lent as money had and received and was entitled to reasonable interest. He considered 12% to be reasonable interest and accordingly gave judgment for the plaintiff for the unpaid balance of the loan with interest at that rate which came in all to $7,113.

Against that decision the defendant has now appealed.

As regards so much of the appeal as questions the trial judge's conclusions as to the amount of money lent, that the money had not in fact been repaid and that the claim was not barred by limitation I do not think it is necessary to discuss the appellant's grounds of appeal, which in any event were not very strenuously argued, beyond observing that these conclusions are or flow from findings of fact by the judge in arriving at which his view of the relative credibility of witnesses played the main part.

The ground of appeal, however, on which the appellant mainly relied and which was urged upon us with very great pertinacity was that the judge was wrong in law in holding that the plaintiff was entitled to recover the money lent and interest as money had and received.

For myself I am unable to accept that contention on the part of the appellant which is contrary to authority which is entitled to the greatest respect, though in the strict sense it may not be binding on this court.

In the case of *Davies* v. *Rees* [1] it was held that where money was lent and a bill of sale given by way of security was void under section 9 of the Bills of Sale Act, 1882, for not being in accordance with the prescribed form then the bill of sale was void for all purposes whatsoever and the lender could not recover on the covenant to repay the loan. Nevertheless there was an implied agreement to repay the money on which the lender could recover. What Lord Esher, M.R. said was this (at p. 411) :—

"There was an implied agreement to repay the money lent, independently of the bill of sale. It was not intended by the Act that the borrower should be able to keep the money which he had borrowed in his pocket because the bill of sale was made void."

In the case of *Burton* v. *Companies Registration Agency* [2] it was held that where a bill of sale was void under section 12 of the Bills of Sale Act, 1882, by reason of being given in respect of a sum under £30, this "did not deprive the defendants of their right to recover the amount advanced with proper interest....; they had only lost the right of recovering the very high rate of interest under the bill of sale".

Again, in the case of *Bradford Advance Co. Ltd.* v. *Avers & wife,*[3] money had been lent on the security of a bill of sale which was void under section 9 of the Bills of Sale Act, 1882. The lender, who conceded that the bill of sale was void, sought to recover the loan in the county court basing his claim on a prior verbal agreement between the parties to pay the principal and interest. On appeal it was held that he could not do so. "Apart from authority", said Bailhache J., "I should have thought that what happened before the bill of sale was executed was mere negotiation". The court went on to hold, however, that the lender was entitled to recover as for money had and received. Bailhache J. said this (at p. 153) :—

"At first sight it would seem that the bill of sale being void, and the covenant to pay interest being therefore void, that the liability to repay the principal had also gone. But that is not so. An action would lie for money had and received, and that action would lie apart from contract or negotiation on the facts of the case, namely, that the plaintiffs had lent the defendant 100 *l.*, and in those circumstances an obligation to repay the loan arises, and that obligation carries with it an obligation to pay interest at a reasonable rate, which I put at 5 per cent."

In parenthesis it is to be noted that in that case though the plaintiffs' claim in the county court was based on an alleged oral agreement to pay the capital sum lent with interest at 60% and there was no question at any time of the pleadings being amended to include a claim based on money had and received, the Court of Appeal having held that the principal sum was recoverable as money had and received did not interfere with so much of the county court judgment as related to the principal sum.

These cases were followed as recently as 1961 in the case of *North Central Wagon Finance Co. Ltd.* v. *Brailsford & anor.*[4] where Cairns J. said:—

"In *Davies* v. *Rees*, it was held that a bill of sale which is void for want of form is void for all purposes, but nevertheless it was held at first instance, and not contested on appeal, that the money could be recovered by the lender with reasonable interest. In *Bradford Advance Co. Ltd.* v. *Ayers*, Bailhache J. held that the money could be recovered, not on the basis of any oral agreement leading up to the bill of sale, but as money had and received. In my view, the same considerations apply where money is advanced on a bill of sale which is void for non-registration."

The same view has been taken by the courts in this country since at least 1906 (see *Arnashellum Chetty* v. *Tengachee Nachiar & ors.*; [5] and *Muthukaruppan* v. *Nagappa Chetty* [6]).

Counsel for the appellant admitted that the English cases which have been cited were against him. He argued, however, that what was said in them had in some way lost its force as a result of the decision of the House of Lords in the case of *Boissevain* v. *Weil* [7] where it was held that the courts could not impute a promise to repay money the borrowing of which was forbidden by law. At first sight the argument is not without attractiveness. It contains, however, a fallacy. In the case of *Boissevain* v. *Weil* what was involved was a borrowing during the war of money in francs to be repaid in sterling and in connection with the transaction a sterling cheque was drawn. The transaction itself, however, was forbidden by the current Defence Regulations, that is, it was something forbidden by law. But what was involved in the present case was a loan of money and lending money is something which is not forbidden by law. Even if the bill of sale with which we are concerned had been void and so tainted with illegality *ab initio* there was nothing unlawful about the lending of money in connection with which it was given.

I would dismiss the appeal.

Barakbah C.J. (Malaya) and **Tan Ah Tah F.J.** concurred.

Appeal dismissed.

Solicitors: *V. K. Palasuntharam*; *Lovelace & Hastings.*